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In the Supreme Court of the United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, ET AL.,
Petitioners,

v.

AMY COHEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF FORMER SECRETARY OF HEALTH, EDUCATION, AND WELFARE CASPAR W. WEINBERGER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

Mr. Weinberger served as Secretary of the Department of Health, Education, and Welfare ("HEW") during the period when HEW developed and published, over his signature, the implementing regulations that are at issue in this case. He was ultimately responsible for considering the very

[1] The parties' written consents to the filing of this brief are being filed today with the Clerk.

extensive public comment on the proposed regulations and for making the policy decisions that are embodied in the final rules. As such, he has a continuing interest in the appropriate enforcement of those regulations to ensure equal educational opportunity without undue interference in the academic freedom of regulated institutions.

The First Circuit's decision in this case is squarely at odds with the terms and intent of those regulations, as well as the Department's stated position at the time of their release. The court of appeals' test would prevent schools from choosing to provide opportunities in response to actual student interest. Instead, schools would be forced to allocate opportunities so as to equalize the rates of participation by men and women. But numerous provisions of the applicable regulations say otherwise: they authorize schools to provide opportunities on the basis of actual student interest and they impose no duty on schools to try to equalize participation rates in any particular activity (except as a remedy for the school's own prior discrimination).

The test adopted by the First Circuit will harm many hundreds of colleges and many thousands of students. And it is important for the Court to correct that error in this case, since the enormous cost of litigating this issue will make capitulation the only feasible course for most other schools. Accordingly, the Court should grant Brown's petition and reverse the decision below.

ARGUMENT

I. THE FIRST CIRCUIT'S TEST IS CONTRARY TO THE IMPLEMENTING REGULATIONS ISSUED BY SECRETARY WEINBERGER

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a), Pet. App. 252a. Congress directed HEW to prepare and publish implementing regulations, including "reasonable regulations" for intercollegiate athletic activities. Pet. App. 255a-56a. Secretary Weinberger issued proposed rules on June 20, 1974 (39 Fed. Reg. 22,228) and, following the receipt of over 9,700 written comments and the holding of public forums around the country, issued final rules on June 4, 1975 (40 Fed. Reg. 24,128). Those regulations remain in effect today and are the rules that govern the issue presented in this case.[2]

At the heart of its opinion, the First Circuit rejected Brown's position based on the court's assertion that:

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[2] The final regulations were initially codified at 45 C.F.R. Part 86. In 1980, when the Department of Education was created, the regulations were republished, without substantive change, at 34 C.F.R. Part 106. See 20 U.S.C. § 3441 and 45 Fed. Reg. 30,802 (May 9, 1980). For simplicity, this brief refers to the current citations in 34 C.F.R. Part 106.

> "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men."

Pet. App. 42a. But that conclusion is flatly contrary to the HEW regulations and the preamble accompanying their release, both of which make it clear that Title IX does *not* require a school either:

- to ignore the actual interests of its students in affording them equal opportunity to participate in its programs; or
- to take affirmative action simply for the purpose of equalizing the number of men and women participating in particular programs.

First, Subpart A of the regulations, which applies to all facets of an institution's activities (athletics, admissions, academic programs, etc.), provides that a school may *voluntarily* choose to, but *has no obligation to*, take affirmative measures to overcome societal conditions that have resulted in a gender imbalance in its programs or activities. It says that:

> "In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient *may* take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."

34 C.F.R. § 106.3(b) (emphasis added). In the accompanying preamble, HEW explained that this provision "permits,

but *does not require*, affirmative efforts" by the school to overcome conditions that have resulted in relatively low participation in particular activities "by members of either sex." 40 Fed. Reg. 24,129 (emphasis added). And the preamble expressly confirmed that this provision is equally applicable to a school's athletic programs. *Id.* at 24,134.[3]

The First Circuit's ruling contravenes this provision. That ruling would force Brown to reallocate its teams and their funds simply to overcome the fact, perhaps caused by societal conditions, that the proportion of its current female students interested in participating in intercollegiate athletics is lower than that of its male students. The regulations clearly state that Brown has no such duty.

Second, portions of the regulations addressing various matters other than athletics expressly recognize that, for reasons having nothing to do with discrimination or violations of Title IX, a school's male and female students may choose to participate to different degrees in various programs. For example, the rules provide that, if an institution offers separate housing for men and women, such housing "shall be as a whole . . . [p]roportionate in quantity to the number of students of that sex *applying for* such housing." 34 C.F.R. § 106.32(b)(2)(i) (emphasis added). Similarly, the regulations provide that where "a particular class contains a substantially disproportionate number of individuals of one sex," the school's only duty is "to assure itself that such dis-

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[3] In fact, a provision in the proposed rules suggesting that schools might have such an obligation was deleted from the final rules, thus further underscoring this point. See 40 Fed. Reg. 24,134.

proportion is not the result of discrimination on the basis of sex . . . by [the school's] counselors." 34 C.F.R. § 106.36(c).[4] By recognizing that Title IX is not offended by such imbalances, these provisions further refute the First Circuit's position.

Finally, the First Circuit's ruling runs afoul of the regulations that specifically address intercollegiate athletics -- which, as noted above, Congress directed be "reasonable." In key part, the regulations provide that, in order to ensure "equal athletic *opportunity* for members of both sexes," the school is to consider "whether the selection of sports and levels of competition effectively accommodate the *interests* and abilities of members of *both* sexes." 34 C.F.R. § 106.41(c)(1) (emphasis added).[5] Thus, HEW expressly recognized that men and women may have different levels of interest, and authorized schools to take those varying levels of interest into account in order to ensure equal athletic "opportunity" for individuals of "both sexes." Further, the preamble accompanying the rules expressly noted that

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[4] Likewise, the accompanying preamble noted that while women might constitute a disproportionate percentage of a school's part-time employees, "[a]ssuming the absence of discriminatory hiring practices on the part of an employer which channel female job applicants into part-time positions, it is questionable whether the Department has the authority to" take any action in response to such an imbalance. 40 Fed. Reg. 24,136.

[5] The accompanying preamble explicitly confirmed that "[t]he Department's intent . . . is to require institutions to take the interests of both sexes into account in determining what sports to offer." 40 Fed. Reg. 24,134.

each school was being given the discretion to measure those levels of interest "by a reasonable method *it deems appropriate*." 40 Fed. Reg. 24,134 (emphasis added).

By compelling each school irrebuttably to assume that its male and female students are equally interested in participating in intercollegiate athletics, rather than by letting it use any reasonable assessment method that it "deems appropriate," the First Circuit's test violates these portions of the regulations as well.

In sum, the First Circuit's decision is inconsistent with and refuted by the regulations that Secretary Weinberger issued to implement Title IX. Those rules were designed to prevent schools from affording lesser participation opportunities to interested members of one sex than to interested members of the other, not to force schools to allocate opportunities in an effort to equalize participation by men and women in any particular programs.

II. THIS CASE INVOLVES AN ISSUE OF GREAT PUBLIC IMPORTANCE THAT SHOULD BE RESOLVED WITHOUT DELAY

The ability of our educational institutions to allocate their scarce dollars so as best to provide athletic opportunities for both male and female students is a matter of great public importance. As the 1975 HEW preamble noted, "athletics sponsored by educational institutions [are] an integral part of [an] institution's education program." 40 Fed. Reg. 24,134. Moreover, the application of Title IX to athletics programs has long sparked extraordinary public interest and concern. For example, HEW's 1974 proposed regulations drew more than 9,700 written comments (see 40 Fed. Reg.

24,128), and that outpouring of interest led Secretary Weinberger to comment, only half in jest, that he "had not realized until the comment period that athletics is the single most important thing in the United States." N.Y. TIMES, June 27, 1975, at 16; see Pet. App. 10a-11a n.6.

The rule adopted by the First Circuit should be corrected without delay. As the course of this case shows, the financial burden on a school that seeks to defend its decision to allocate athletic opportunities by equally accommodating the actual interests of its male and female students -- when the relative level of interest is greater for one sex than the other -- is prohibitive. Thus, absent prompt correction by this Court, other schools are likely simply to acquiesce in the First Circuit's decision and adopt its quota-based system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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